

# The Charter, Equality Rights, and Women: Equivocation and Celebration

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# The Charter, Equality Rights, and Women: Equivocation and Celebration

## **Abstract**

In this article, the author examines some of the critiques made and some of the aspirations raised in the early days of the Charter by left/feminist/marginalized groups about the Charter, the equality guarantee, and the judicial decision makers. The author explores how these fears and hopes have played out with respect to Charter equality rights for women by looking at some of the sex equality decisions that have been made by the Supreme Court of Canada. The cases are discussed under the headings of reproduction, violence against women, family, employment, and socio-economic claims to explore how the sex equality analysis has fared in these different contexts. As the title of this article reflects, the author's assessment is one of equivocal celebration and celebratory equivocation.

# THE *CHARTER*, EQUALITY RIGHTS, AND WOMEN: EQUIVOCATION AND CELEBRATION<sup>©</sup>

BY DIANA MAJURY\*

In this article, the author examines some of the critiques made and some of the aspirations raised in the early days of the *Charter* by left/feminist/marginalized groups about the *Charter*, the equality guarantee, and the judicial decision makers. The author explores how these fears and hopes have played out with respect to *Charter* equality rights for women by looking at some of the sex equality decisions that have been made by the Supreme Court of Canada. The cases are discussed under the headings of reproduction, violence against women, family, employment, and socio-economic claims to explore how the sex equality analysis has fared in these different contexts. As the title of this article reflects, the author's assessment is one of equivocal celebration and celebratory equivocation.

Dans cet article, l'auteur examine à la fois les critiques et les ambitions exprimées par les féministes, les groupes marginalisés et les gauchistes dans les jours suivant l'entrée en vigueur de la *Charte canadienne des droits et des libertés*, ainsi que les critiques faites à l'égard de la garantie d'égalité et des décideurs judiciaires. L'auteur examine comment ces craintes et ces ambitions se sont matérialisées vis-à-vis les droits d'égalité des femmes en examinant les décisions pertinentes émanant de la *Cour suprême du Canada*. Pour comprendre comment l'analyse de l'égalité sexuelle a été reconnue parmi des contextes variés, l'auteur étudie ces décisions sous les rubriques de la reproduction, la violence contre les femmes, la famille, le travail et les revendications socio-économiques. La conclusion de l'auteur en est une d'incertitude qui doit être célébrée, et d'une incertitude festive.

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## I. INTRODUCTION

The *Charter*,<sup>1</sup> and particularly the equality rights provision<sup>2</sup>, has generated a proliferation of legal and social science scholarship; it has been the subject of innumerable conferences, symposia, and workshops. Much of this *Charter* writing and talking has been of the abstract, think-piece type of scholarship<sup>3</sup>—to which this article aspires to contribute. This attention alone tells us a great deal about the significance of the *Charter* and its impact—it has us talking, thinking, writing, and debating about the role of law, its possibilities and its limitations, its seductions and its portents. And, while the questions and the arguments relating to law more generally, as well as to specific attempts to use law to further social change, may basically be the same as they were in pre-*Charter* days, the *Charter* has reinvigorated these debates such that they are very much alive and lively, informing and directing the more specific, focused *Charter* analysis. As someone who would describe herself as a *Charter* pragmatist<sup>4</sup>, I savour the questions and challenges that force me to think more deeply, more skeptically, more big-picturely, and, I hope, more radically, about *Charter* work—its effectiveness, its limitations, its unintended consequences, and its larger political and social meanings. I think that we all need to be held accountable, and to account, for our thinking and for our activism; these intense *Charter* discussions and disagreements are an important part of that process of accountability.

In this article, I want to look at some of the major criticisms and concerns that left/feminist/marginalized groups have raised about the

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>2</sup> *Ibid.*, s. 15. The equivocation reflected in the title, that inheres in section 15 of the *Charter* and in feminist responses to it, arises even in relation to the creation of this special issue of the Osgoode Hall Law Journal celebrating—or at least recognizing—the twentieth anniversary of the *Charter*. 2002 is not the twentieth anniversary of section 15 of the *Charter*; it did not come into effect until three years later, in 1985. In terms of celebration or recognition, this can be read two ways. One way is to see this as a continuing slight to section 15, the tag-along younger sister, who is included in the party but whose unique history, status, and struggles are repudiated by that inclusion. Alternatively, or I prefer, simultaneously, one can see this as doubling the opportunities to mark the advent of section 15. She cannot be left out of the general *Charter* attention, but she will have her own exclusive party in three years' time. She is the difficult younger sister who demands more than her share of the attention because ... she deserves it.

<sup>3</sup> This is somewhat ironic, given that abstractness is a critique that many writing in this vein make of the *Charter* itself.

<sup>4</sup> See *infra*, Part II.A., for a discussion of what I mean by this term.

*Charter*, about rights, and about equality<sup>5</sup> and some of the more positive *Charter*/rights/equality expectations from among these same groups, looking for points of difference and commonality among these writers.<sup>6</sup> This background will help me look specifically at if and how these concerns and expectations have played out with respect to the *Charter*, equality rights, and women, which is the subject of this article, by looking at some of the sex equality cases that have come before the Supreme Court of Canada.

## II. ACADEMIC WRITINGS

### A. *On the Charter Generally*

The strongest and most vociferous critiques of rights discourse generally, and the *Charter* more specifically, have largely emanated from the white, male left, generally reflecting a marxist or class-based perspective.<sup>7</sup> One of the primary issues that underlies the *Charter* critique for many on the left is the power the *Charter* cedes to the courts, that is, to elite, unelected judges who are largely unaccountable. According to Harry Glasbeek, “[n]o matter how little we think of our existing democratic institutions, they are intended to be democratic,” while courts and judges

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<sup>5</sup> I am engaging here only with the critiques and discussions from among what might be termed “progressives.” I am not looking at right-wing critiques, even though there are some interesting parallels and resonances among right and left critics. See Sheila McIntyre, “Feminist Movement in Law: Beyond Privileged and Privileging Theory” in Radha Jhappan, ed., *Women’s Legal Strategies in Canada* (Toronto: University of Toronto Press, 2002) 42.

<sup>6</sup> Despite my tendency to portray them as oppositional, I see these positions more as interrelated and overlapping, situated along a continuum.

<sup>7</sup> I think it is important to try to identify who articulates various positions, that is who it is that is talking positively or negatively about the *Charter*, as a means of contextualizing and de-individualizing these discussions and providing additional political grounding for an analysis of what is being said. As one who believes that race, gender, etc., for example, matter to who we are, how we are treated, and relatedly then to how we think about the world, I think it is important to try to factor (as best one can) our multiple identities into the analysis of academics’ work. The critique of the approach that I am advocating mirrors the more general critique of a grounds-based approach to discrimination. According to this critique, identity categories are artificial compartments that oversimplify and give rise to unwarranted assumptions and to the unreflective attribution of group characteristics. Given that the categories are the problem, relying on them inevitably reinforces the problem, that is one is actively engaging in the act one is critiquing when one categorizes people on these bases (race, gender, etc.). It is true that categorization is the source of discrimination; it is discrimination that makes the categories matter. But that is the very point, the catch 22—discrimination does make the categories significant—the recognition that our experiences (of discrimination as well as of identity-based pride and connection) and our situation have an impact on our thinking. Group membership is not determinative, but it is a factor in forming one’s perspective.

"...[are] not, in any serious way, subject to the discipline of democratic politics ... ."<sup>8</sup> Glasbeek credits democracy—electoral mechanisms and public sphere activities—with the imposition of human rights obligations as a mechanism to force government and private sector actors "... to deal more equitably in respect of differences," and then asks why we would "entrust our future to an appointed, electorally unaccountable institution such as the judiciary which has never produced any analogous results?"<sup>9</sup> But his question ignores the fact that much of the public sphere activity referred to actually took place in the courts. Frequently what has happened in the courts has forced our elected representatives to take action on the human rights front.<sup>10</sup> Legislative action acknowledging and supporting basic human rights has been painfully slow, often vigorously resisted, and sometimes enacted despite public opinion to the contrary. Minority rights and marginalized groups present a serious challenge to those who put their faith and hope in democracy, however flawed. Canada has a long history of sexist and racist legislation;<sup>11</sup> the courts have provided one forum in which to challenge and resist such majority dominance. There is something to be said for an independent judiciary with the power to make unpopular decisions, particularly in the context of human rights.

The *Charter* has become somewhat of a lightning rod in the larger debates about parliamentary supremacy and judicial activism and about legal, as opposed to political, engagement. Those commentators who are negative about the *Charter* tend to view the legal and the political as separate arenas, implying that intervention is an either/or proposition. Those who are more sanguine about the *Charter* generally see the two arenas as highly interrelated and are often adept at playing one off against the other. The interplay between the courts and the legislatures opens up additional spaces for public participation and arguably strengthens the democratic process.

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<sup>8</sup> Harry J. Glasbeek, "From Constitutional Rights to 'Real' Rights – "R-i-i-g-h-ts Fo-or-wa-ard Ho"!" (1990) 10 Windsor Y.B. Access Just. 468 at 469-70.

<sup>9</sup> *Ibid.* at 470.

<sup>10</sup> The history of Canadian sexual harassment law is one example and the inclusion of sexual orientation in Alberta's human rights legislation is another.

<sup>11</sup> See Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991) and Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Society, 1999).

The concern of largely unfettered<sup>12</sup> judicial authority under the *Charter* relates to several critiques levelled against the *Charter*. The abstractness and indeterminacy of rights heighten concerns about judicial elitism and the lack of judicial constraints. Relatedly, the symmetrical and universal nature of the rights provided by the *Charter* are considered problematic. *Charter* rights and protections are available to everyone and, because they are themselves without substantive content, they can be employed for almost any purpose. This problem is compounded by the perception of these rights as individualistic, exclusionary, and not amenable to group-based analysis or collective action. Given our judiciary and the absence of more specific direction from the *Charter*, it is more likely that rights will be interpreted to reproduce existing power relations and protect the status quo than to challenge and redress inequities.

Joel Bakan argues that the *Charter* is infused with the ideology of formal equality such that individuals are abstracted out of concrete social relations of inequality and portrayed as formal equals.<sup>13</sup> The ideology of formal equality masks and neutralizes inequality. In this context, disparate impact is constructed as natural and inevitable or as a product of choice or consent, and not as a function of discrimination. Marginalized claimants then have an uphill battle to prove inequality or discrimination, especially when that inequality is long-standing and deeply entrenched. Andrew Petter and Alan Hutchinson argue that rights provide a “veneer of consensus,” the illusion of shared values and aspirations, that makes it more difficult to detect and respond to underlying disagreements and power struggles.<sup>14</sup>

By abstracting and individualizing, rights and rights discourse are seen to depoliticize issues of power and domination, making them more palatable and manageable, even rendering them invisible. The process of translating oppression and domination into the legal language of rights, discrimination, and equality is seen by *Charter* critics as necessarily conservative.<sup>15</sup> The arguments and analysis put before the courts are

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<sup>12</sup> The question of the extent to which the judiciary is fettered is also subject to debate. Section 33 of the *Charter*, the “notwithstanding clause,” leaves the final word to Parliament, if it has the courage to invoke it.

<sup>13</sup> Joel Bakan, “Constitutional Interpretation and Social Change: You Can’t Always Get What You Want (Nor What You Need)” (1991) 70 Can. Bar Rev. 307.

<sup>14</sup> Andrew Petter & Allan C. Hutchinson, “Rights in Conflict: The Dilemma of Charter Legitimacy” (1989) 23 U.B.C. L. Rev. 531.

<sup>15</sup> William E. Conklin, “‘Access to Justice’ As Access to a Lawyer’s Language” (1990) 10 Windsor Y.B. Access Just. 454.

constrained and distorted so that even a victory can at best be only partial and inadequate, easily subverted and turned against the more vulnerable. The *Charter* creates the illusion of social change and the mirage of a better world that captures the imagination and energy of progressive people who are then diverted into expensive and protracted legal battles that are conservatizing and counterproductive.

*Charter* critics view the anti-rights, anti-*Charter* backlash as reflecting negatively on the *Charter* and creating a more hostile and reactionary environment. The backlash is often framed in terms of formal equality that is being used to try to roll back earlier gains made by subordinated groups. *Charter* advocates, on the other hand, interpret the backlash as indicative of at least some successes under the *Charter* and point to the overtly political nature of the backlash as proof against the claim of *Charter* depoliticization. The formal versus substantive equality debate generated by the *Charter* is seen as significant, warranting serious public attention and involvement. The *Charter* has done much to foster public discussions about the meaning of equality in very concrete terms.

Given its exclusive application to government action, the *Charter* is criticized as inevitably reinforcing the segregation constructed between public and private, thereby enabling powerful private sector exploiters to evade social responsibility while portraying themselves as victims. Autonomous, "equal," private actors are seen as needing protection from the heavy-handed, interventionist state. The *Charter* reinforces the power imbalances, privilege, exploitation, and domination that permeate the private sphere. Private actors, including individuals, corporations, and institutions, are immune from having to adhere to *Charter* values in their own interactions but are encouraged to invoke the *Charter* when they believe the state is trenching on their private turf, reconfigured into rights through *Charter* discourse.

Even though they are general in nature, these criticisms of the *Charter* seem to focus primarily on the likely results in cases and on the negative uses that can and have been made of the *Charter*. Feminists, on the other hand, have tended to see the *Charter* as part of a bigger picture and a longer-term strategy.<sup>16</sup> While most feminists would, to a large extent, make these same criticisms, they tend to see them as cautions or concerns rather than as reasons to reject the *Charter*. The *Charter* is seen as

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<sup>16</sup> This is not to say that all feminists support the *Charter*; feminists articulate the full range of perspectives on the *Charter*. My comments here are generalizations and suffer the over-inclusion problem of all generalizations. Nonetheless, I think that feminists tend to be drawn to the more pragmatic, it's-worth-a-try end of the *Charter* spectrum.



providing a forum for raising issues; for developing more sophisticated analysis and argument for public, judicial, and political education; and for mobilizing and politicization.<sup>17</sup> From this perspective, the outcomes of individual cases are of less importance, and negative *Charter* arguments and decisions provide fodder for future action. Rather than masking disagreement and power differentials, the *Charter* is seen as offering an opportunity to bring these matters explicitly to the foreground.

Rather than falling into either the *Charter* optimist/enthusiast or the *Charter* pessimist/resister/skeptic categories that are often invoked, I would describe most feminists (including myself) who work in this area as *Charter* pragmatists who see the *Charter* as one among a limited number of potential tools to expose and to argue for the redress of women's and other marginalized groups' subordination. We have no illusions that *Charter* litigation is an easy undertaking; we know that it is fraught with dangers, both foreseen and unforeseen, and that whatever we do will have negative as well as positive repercussions. We know that when we invoke the *Charter* we take a calculated risk, and we try to make these calculations carefully and thoroughly. But we also know that to ignore the *Charter* is to ignore an opportunity, as well as to concede the equality terrain to those who would use it to justify and perpetuate inequality. This *Charter* pragmatism is consistent with the prevailing feminist attitude to law more generally—a strong critique of law, coupled with a recognition of the significance of law as a site of power and hence an arena for struggle, and of the practical impossibility of eschewing law altogether.<sup>18</sup>

From her perspective as an Aboriginal woman, Mary Ellen Turpel provides a much more fundamental critique of the rights paradigm and of the *Charter* than any criticism outlined above.<sup>19</sup> She calls into question the cultural authority of the *Charter*, pointing out that the *Charter* imposes a culturally and historically specific conceptual framework on people who do not share that culture or that history. Aboriginal people are put in the impossible position of having to assert cultural difference through the medium of an alien framework that is incapable of understanding or reflecting that difference. The fact that Aboriginal people have, in

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<sup>17</sup> See McIntyre, *supra* note 5 and Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994).

<sup>18</sup> See e.g. Sherene Razack, "Using Law for Social Change: Historical Perspectives" (1992) 17 Queen's L.J. 31; Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

<sup>19</sup> Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 503.

particular situations, chosen to rely on *Charter* rights is not an uncritical endorsement of the *Charter* but may simply be a concession to its dominance and a reflection of the urgency of, or lack of options with respect to, the specific issue.<sup>20</sup> Turpel does not attempt to resolve what is an unresolvable dilemma posed by "... problems of conceptual reference for which there is no common grounding or authoritative foothold."<sup>21</sup>

Equality rights present a similar dilemma for members of other subordinated groups who seek to invoke them. To varying degrees, they too will not share in the language or in the conceptual framework of the *Charter*. The challenge that Turpel describes for a judge adjudicating in a situation involving cultural difference may apply to other situations of "difference."

For a judge, a situation of cultural difference should be and must be a situation of *not* knowing which direction to go, a situation involving choices about reasoning that may not be defensible or acceptable. It involves episodes of undecidability, self-judgment, and uncertainty. It would involve acknowledging the imperative of admitting mistakes and recognizing ignorance.<sup>22</sup>

This imperative can be taken up by advocates who present equality claims that challenge underlying premises and taken-for-grantedisms. To try to use the *Charter* to its fullest, they need to take the risk of attempting to shift accepted truths and understandings and ways of knowing and to muster the confidence and courage to put forward arguments that may appear indefensible or unacceptable.<sup>23</sup>

## B. *On Equality*

"Equality is thus a process—a process of constant and flexible examination, of vigilant introspection, and of aggressive open-

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<sup>20</sup> The complexities of this dilemma are readily apparent in the case of the *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 [NWAC] in which NWAC sought and was denied funding and rights to participate in the constitutional review process equal to the four national Aboriginal organizations included by the federal government. The intersectional discrimination of race and sex placed some Aboriginal women in an intolerable, bifurcated position that the Court did not address or even acknowledge in its decision in this case.

<sup>21</sup> *Supra* note 19 at 508.

<sup>22</sup> *Ibid.* at 527.

<sup>23</sup> I see this as a particularly suitable role for intervenors whose job it is to bring a different perspective before the court and who are not constrained by the needs and interests of clients.

mindedness.”<sup>24</sup>

Much of the academic writing examining the equality guarantee in the early days of the *Charter* referred to debates over the meaning of equality as largely a debate between formal and substantive equality. At that time, formal equality was the dominant understanding of what equality meant and required. Formal equality is premised on the understanding that equality means treating likes alike and posits same treatment as its defining feature. It focuses on procedures with the goal of ensuring equality of opportunity. Substantive equality recognizes that in order to further equality, policies and practices need to respond to historically and socially based differences. Substantive equality looks to the effects of a practice or policy to determine its equality impact, recognizing that in order to be treated equally, dominant and subordinated groups may need to be treated differently.

While feminists were unanimous in their rejection of the formal equality approach and their support for the substantive model of equality, they were dubious about the likelihood of Canadian courts adopting substantive equality as the guarantee provided by section 15. However, more recent equality writing accepts that substantive equality is the operative model in Canadian law.<sup>25</sup> This breakthrough came in the *Andrews*<sup>26</sup> case, the first decision by the Supreme Court of Canada on section 15. For all those who are not *Charter* resisters or *Charter* rejecters, the endorsement of substantive equality must be seen as a positive step. The feminist response to *Andrews* ranged from enthusiasm to cautious optimism. Among the cautiously optimistic were those who were skeptical about courts' ability to make the transition from formal to substantive equality in more than name. Whatever we called it, the fear was that courts would inevitably and unconsciously continue to focus on likeness (to dominant groups) as the key to equality in terms of recognition and of remedy. This fear has magnified, not dissipated, in the years since *Andrews*. I increasingly hear the claim being made among social activists involved in *Charter* litigation that we (lawyers, activists, and judges) have not really moved beyond a formal equality analysis. This critique raises some very

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<sup>24</sup> Rosalie Abella, “Limitations on the Right to Equality Before the Law” in Armand de Mestral *et al.*, eds., *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Qc.: Yvon Blais, 1986) 223 at 225.

<sup>25</sup> See e.g. The Right Honourable Beverley McLachlin, “Equality: The Most Difficult Right” (2001) 14 Sup. Ct. L. Rev. (2d) 17. According to Chief Justice McLachlin, at 21, “[s]ubstantive equality is recognized worldwide as the governing legal paradigm.”

<sup>26</sup> *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 [*Andrews*].

fundamental questions (for example, whether because it is a comparative concept, equality can ultimately only mean formal equality, albeit in forms more sophisticated than treating *x* and *y* identically) about what is meant by formal and substantive equality. The cases confirm that these continue to be difficult questions on which we have not progressed very far, if at all, beyond the judicial thinking in *Andrews*. Some of the most recent decisions of the Supreme Court of Canada raise the spectre that the Court is slipping backward in its understanding of and commitment to substantive equality.

Feminist legal scholars were engaging with these equality critiques long before the advent of the *Charter* and these debates continue. For some feminists, the problems inherent in equality as an analytical tool and as a goal render it of extremely limited utility for women and other subordinated groups. In taking this position, Radha Jhappan provides a strong and articulate critique of the concept of equality. She argues that "... the discourse of *legal* equality as an overarching goal and strategy is an idea whose time may have passed."<sup>27</sup> One of her primary criticisms is the inherently comparative nature of equality, a criticism that anticipates the question raised above of whether an equality analysis can ever lead to anything more than variations on the formal equality theme. While I am sympathetic to this critique and share the concern, I am not convinced that other concepts, including the concept of justice that Jhappan prefers, are not also limited by an implicit need for comparators.<sup>28</sup>

The need for comparison gives rise to the related critique of essentialism—that equality posits women and men each as undifferentiated, unidimensional groups. Differences among women, as among men, are ignored; other sites of oppression are treated as irrelevant. Further, the essentialism leads to assimilationist arguments, with white men as the standard to which all women are assumed to aspire and against which they are inevitably compared. Such an approach is incapable of understanding, not to mention addressing, the intersectional discrimination and disparate aspirations of those who are more than one identity removed from the dominant group. Here again the critique is of the formal model of equality and raises the question whether it is practically possible to use equality to move beyond that model to address the diverse needs and experiences of

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<sup>27</sup> Radha Jhappan, "The Equality Pit or the Rehabilitation of Justice" (1998) 10 C.J.W.L. 60 at 63.

<sup>28</sup> Jhappan argues that a justice approach would lead to the determination of a more appropriate reference group (*ibid.* at 95). Thus, even with justice one faces the problem of finding the appropriate reference or comparator group. While this is an ongoing problem that can seriously hamper or deflect the analysis of judges and litigators, I am not sure that there is anything inherent in either the justice concept or the equality concept that more, or less, effectively directs the comparative analysis.

women. Jhappan thinks not: "... the equality frame is simply too narrow to contain the complex intersectional analysis because it is *by nature* comparative (one group compared against another), essentialist and ... impossible."<sup>29</sup> These are pressing concerns, but it may be that whatever concept is adopted will be limited by prevailing assumptions and values and that the issue is less about finding the better concept and more about trying to make the concept at hand do what one wants it to.

In the *Charter*-lobbying days, feminists were not confident that an anti-discrimination equality provision would provide adequate protection to women. The perceived need for additional protection for women was grounded in the dismal history of sex discrimination complaints under the *Canadian Bill of Rights*,<sup>30</sup> U.S. jurisprudence under the *U.S. Constitution*<sup>31</sup> whereby sex discrimination allegations were subjected only to intermediate scrutiny rather than the more strict scrutiny accorded to some other forms of discrimination, as well as in fears generated by the inclusion of a perceived deference to multicultural rights in section 27 of the *Charter*.<sup>32</sup> For these reasons, section 28, the separate sex equality provision of the *Charter* that states, "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons," was considered of vital importance by those who were advocating on behalf of women's rights when the *Charter* was being drafted and going through the parliamentary process. While some critics saw section 28 as meaningless, arguing that it added nothing to the *Charter*,<sup>33</sup> much of the early feminist writing on the *Charter* saw great possibilities for the effective use of section 28. Colleen Sheppard saw this in relation to the enhancement of section 7 rights for women: "The radical potential of this section [28] becomes apparent if we contemplate the notion of equal liberty or security of the person for women and men."<sup>34</sup> Mary Eberts argued that section 28

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<sup>29</sup> *Supra* note 27 at 79.

<sup>30</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

<sup>31</sup> U.S. Const. [*U.S. Constitution*].

<sup>32</sup> Mary Eberts, "Sex-based Discrimination and the Charter" in Anne F. Bayefsky & Mary Eberts, eds., *Equality and The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 183; Katherine J. de Jong, "Sexual Equality: Interpreting Section 28" in Bayefsky & Eberts, *ibid.* at 493; and Penny Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983).

<sup>33</sup> See e.g. Elmer A. Driedger, "The Canadian Charter of Rights and Freedoms" (1982) 14 *Ottawa L. Rev.* 366 at 373.

<sup>34</sup> N. Colleen Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" (1986) 10 *Dal. L.J.* 195 at 222.

"should ... lead a court to require a high level of justification [under section 1] for any sex-based distinction."<sup>35</sup> Similarly, Rosalie Abella postulated that section 28 "means that in interpreting the onus on a respondent to justify the reasonableness of a limit to an otherwise guaranteed right, gender equality is an immutable right."<sup>36</sup> According to Catharine MacKinnon, "Anti-subordination could be the distinctive guiding interpretive principle of section 28."<sup>37</sup> There was an impressive array of feminists anticipating a strong and meaningful section 28.

Despite these great hopes for section 28, it would seem that the critics were more accurate in their predictions of its impact. Section 28 is seldom alluded to in current *Charter* literature and cases. In my search, I was able to find only twelve Supreme Court of Canada cases in which section 28 was mentioned. The majority of these were sexual assault cases in which the reference to section 28 was found in the following frequently quoted passage from Justice Cory in *Osolin*: "The provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant."<sup>38</sup> As in *Osolin*, the reference to section 28 is almost always in conjunction with section 15, confirming the critics' perception that section 28 added nothing beyond what was already provided by section 15. I found only three cases in which section 28 received any discussion separate and distinct from section 15. In *NWAC*, the only one of these cases in which the Court dealt at any length with section 28, Justice Sopinka, having dismissed the section 28 argument in relation to section 2(b) of the *Charter*, made the point that it would have been better characterized as a section 15 argument, which he then dismissed as failing on the same basis.<sup>39</sup> The other two references to section 28 alone were contained in single

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<sup>35</sup> Eberts, *supra* note 32 at 216.

<sup>36</sup> *Supra* note 24 at 232.

<sup>37</sup> Catharine A. MacKinnon, "Making Sex Equality Real" in Lynn Smith, ed., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: Canadian Human Rights Reporter, 1986) 37 at 41.

<sup>38</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595 at 669 [*Osolin*].

<sup>39</sup> *NWAC*, *supra* note 20 at 665. The Federal Court of Appeal decision in this case providing a declaration that the federal government had restricted the freedom of expression of Aboriginal women, thus violating their section 2(b) and 28 *Charter* rights, is one of few decisions in which section 28 grounded an equality decision. This decision was overturned on appeal.

sentences of little substance.<sup>40</sup>

There has been no engagement in the decisions of the Supreme Court of Canada with the question of what, if anything, section 28 adds in terms of equality protection for women (or for men). It is interesting to speculate why this happened—whether section 28 was seldom invoked and accordingly has languished forgotten and untested; whether groups were unable to come up with a distinctive section 28 argument; whether it was eclipsed and made redundant by stronger section 15 jurisprudence than was anticipated; whether judicial discomfort and/or uncertainty about section 28 led to its abandonment; or whether women's groups developed discomfort about the apparent privileging of sex discrimination claims over other forms of discrimination.<sup>41</sup>

In the early days of the *Charter*, feminists who saw it as a potentially positive vehicle for raising and challenging issues of concern to women were fairly uniform in their descriptions of what they were looking for in section 15. Feminist academics promoted an interpretation of equality that focused on effects, inequality, and context, that was itself fluid and open<sup>42</sup> and that understood equality as relational rather than comparative.<sup>43</sup> While cognizant of the risks involved, feminists tended to respond to the indeterminacy of equality as an opportunity for putting forward a radical vision of equality, rather than seeing it exclusively as a cloak for elitist self-perpetuation. Similarly, feminists' response to the critiques of abstractness, individualism, and false universals was to call for a contextual analysis that focused on particularized, group-based inequality. In other words, feminists generally seemed more interested in trying to make the *Charter* work than in wholesale rejection of it. McIntyre ascribes this more positive approach to the *Charter* to feminist activism and ongoing engagement in political struggle as part of feminists' daily lives, such that "declaring any dominant institution, including rights discourse and rights litigation, unambiguously

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<sup>40</sup> See *R. v. Hess*, [1990] 2 S.C.R. 906, Wilson J. [*Hess*] and *R. v. Seaboyer*, [1991] 2 S.C.R. 577, L'Heureux-Dubé J., dissenting [*Seaboyer*].

<sup>41</sup> The question of the demise of section 28 is intriguing and worthy of a much fuller exploration but, sadly, I cannot dally with it any further in this article.

<sup>42</sup> See e.g. Christine Boyle and Sheila Noonan, "Prostitution and Pornography: Beyond Formal Equality" (1986) 10 Dal. L.J. 225; Diana Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1991) 4 C.J.W.L. 407; and Sheppard, *supra* note 34.

<sup>43</sup> Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 C.J.W.L. 37; Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

off-limits is indefensible in theory as in practice.”<sup>44</sup> As McIntyre asserts, this willingness to engage is always, and necessarily, accompanied by deep ambivalence and discomforting awareness of the risks of such involvement.

The critique of *Charter* rights as symmetrical and universal is particularly apropos with respect to section 15, given that it is intended to address issues involving asymmetrical power. In relation to this issue, Judy Fudge describes the situation of women having had to expend major time, energy, and money to defend against men’s equality-based challenges to legislation that women had previously spent years fighting to attain as “the ultimate paradox of the *Charter*.”<sup>45</sup> The concern with symmetry is that, with the exception of disability, the grounds are set out in neutral terms, that is, as Sheppard describes it:

... in ways that obscure the historical and continuing realities of inequality facing the subordinated group or groups within each ground. Thus, in terms of the formal language of anti-discrimination law, discrimination on the basis of sex extends parallel, symmetrical protection to both men and women. Discrimination on the basis of race protects both minority and majority.<sup>46</sup>

Although I am not aware of the argument that section 15 should be applied exclusively to subordinated groups having been made explicitly,<sup>47</sup> feminists have certainly argued against the symmetrical application of the equality guarantee. *Andrews*, the first Supreme Court of Canada decision on section 15, with its contextualizing language of historical disadvantage, vulnerability, and lack of political power, went some way toward unbalancing the symmetry of section 15. Going beyond the individualized assessment, Lynn Smith has suggested the imposition of a different standard when the challenged provision worsens the situation of a

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<sup>44</sup> McIntyre, *supra* note 5 at 46.

<sup>45</sup> Judy Fudge, “What Do We Mean by Law and Social Transformation?” (1990) 5 C.J.L.S. 47 at 58; see also Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

<sup>46</sup> Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 Can. Bar Rev. 893 at 908.

<sup>47</sup> One of the most obvious problems with such an approach is that it assumes that it is always clear which is the subordinated group. Such a clear-cut distinction between oppressed and oppressor is belied by our complex and multiple identities and issues of intersectional discrimination. The possibility of excluding the dominant group from section 15 protection in relation to the sex ground was explicitly rejected by Justice McLachlin in *Hess*, *supra* note 40 at 943-44: “There is no suggestion in that language [in *Turpin*] that men should be excluded from protection under s. 15 because they do not constitute a ‘discrete and insular minority’ disadvantaged independently of the legislation under consideration.” She relied on section 28 to support this conclusion and proceeded to find a breach of section 15.



disadvantaged person than when it is prejudicial to a member of an advantaged group.<sup>48</sup> Others have suggested that the symmetry problem could be overcome, or at least diminished, by a focus on groups rather than on the neutral grounds.

A further concern with the grounds set out in section 15 is whether they are capable of addressing situations of intersectional discrimination. The issue of intersectional discrimination was almost completely absent in the early feminist writings on the *Charter*. Since those days, intersectional discrimination as a critical component of any equality analysis has been powerfully brought to the foreground through the writings and advocacy of women of colour.<sup>49</sup> Anti-discrimination/equality law must be capable of responding effectively to the complex and intersectional discrimination that many people experience; to the extent that it fails to do so, the law itself is discriminatory. The concern has been raised that a grounds-based approach to discrimination may not be capable of addressing intersectional discrimination—that, at best, grounds of discrimination would allow one to argue the discrimination as sex plus race and/or disability and/or sexual orientation, that is multiple, not intersectional, discrimination. In response to this problem, Nitya Iyer has recommended a relational approach that addresses all of the potential grounds of discrimination, rather than focusing on the characteristics of the individual complainant.<sup>50</sup> Others have argued that a focus on specific groups, rather than on the more generalized grounds, would be more amenable to an intersectional analysis.<sup>51</sup> Justice Claire L'Heureux-Dubé unsuccessfully tried to persuade her fellow Supreme Court justices that an approach focusing on identifying the relevant subgroup(s) that have been subjected to exploitation was preferable to relying solely on the water-tight compartments of a grounds-

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<sup>48</sup> C. Lynn Smith, "Judicial Interpretation of Equality Rights under the *Canadian Charter of Rights and Freedoms*: Some Clear and Present Dangers" (1988) 23 U.B.C. L. Rev. 65 at 93-94.

<sup>49</sup> See e.g. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chicago Legal F. 139; Iyer, *supra* note 43; Nitya Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25; and Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999).

<sup>50</sup> Duclos, *ibid.*; see also Jennifer Nedelsky & Craig Scott, "Constitutional Dialogue" in Joel Bakan & David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 59.

<sup>51</sup> See e.g. Anna Pellatt's discussion of the group-based argument that the Women's Legal Education and Action Fund [LEAF] put forward in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*], in Anna S. Pellatt, "Equality Rights Litigation and Social Transformation: A Consideration of the Women's Legal Education and Action Fund's Intervention in *Vriend v. R.*" (2000) 12 C.J.W.L. 117.

based approach.<sup>52</sup> Dianne Pothier, in response to Justice L'Heureux-Dubé, has argued that we should not move away from grounds to groups, but rather should engage in a more sophisticated grounds-based analysis that recognizes grounds as historical markers of discrimination that raise suspicion when invoked.<sup>53</sup> As Pothier has commented, this is not a matter of oppositional approaches, but rather a question of how to make grounds and groups work together.

An assessment of women, equality rights, and the *Charter* must address questions relating to intersectional discrimination as a central concern. Tellingly, this is a bit difficult given the limited number of complainant groups that have come before the Supreme Court of Canada, as well as the limited ways in which their cases have been framed.

### C. *On the Decision Makers*

One issue that many of the general discussions of the *Charter* largely ignore is the differences among the judges.<sup>54</sup> As discussed above, the power accorded unelected, unaccountable judges under the *Charter* is one of the principal critiques emanating from the male left. There is a tendency among these critics to lump all judges together as sharing a single judicial ideology that aligns them with the social and economic elite.<sup>55</sup> Feminists, however, have shown considerable interest and see considerable significance in gender differences among judges.<sup>56</sup> This is not surprising for a number of reasons. Advocating for more women/feminist judges, as well as male judges from other subordinated groups, has been a priority for many feminists. Women judges themselves have commented on the

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<sup>52</sup> See Justice L'Heureux-Dubé's dissent in *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*].

<sup>53</sup> Pothier, *supra* note 43.

<sup>54</sup> However, for an article that is all about differences among Supreme Court of Canada judges, see Marc Gold, "Of Rights and Roles: The Supreme Court and the Charter" (1989) 23 U.B.C. L. Rev. 507.

<sup>55</sup> See e.g. Bakan, *supra* note 13 at 319. While there is no question that judges, almost by definition, are members of the social and economic elite in Canada, this does not preclude judges, like law professors, from having a class consciousness. Additionally, class is only one piece of a multiple and complex identity and is not determinative of one's ideology.

<sup>56</sup> There are as of yet so few Aboriginal and racialized judges that it is difficult to do anything more than speculate about the positive differences that these judges would bring and the personal cost to these judges. See e.g. *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484.

gendered dynamics of judging.<sup>57</sup> To date, the women judges on the Supreme Court have generally been more open and courageous in their equality analysis than their male colleagues. Women are recent entrants to the judicial arena, as they have been somewhat less recent entrants to the legal community and to academia. There are strong parallels among the subordinating experiences of feminist lawyers, feminist academics, and feminist judges that feminist scholars understand must have an impact on their judicial decision making.<sup>58</sup> And finally, as the cases discussed below demonstrate, there have been some striking gender splits in Supreme Court of Canada decisions, particularly on sex equality issues, that have certainly not escaped feminists' notice. While these women-only dissents are disappointing because they are dissents, they are at the same time affirming; they speak strongly to the importance of dissent judgments.<sup>59</sup>

There seems to be a commonly held view that unanimous decisions by the Supreme Court are the most desirable. According to Marc Gold, for example, "it would be bizarre and undesirable if efforts were not made to maximize those occasions where the Court could speak with one voice."<sup>60</sup> However, the costs exacted by forced unanimity can be high, as evidenced by the painstaking contortions and watering down of positions that seem to have gone into the creation of the *Law*<sup>61</sup> decision as a consensus of the Court. In some areas, the certainty and clarity that a unanimous Supreme Court decision can bring to bear on a fraught legal issue may well be a

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<sup>57</sup> See e.g. Madame Justice Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28 Osgoode Hall L.J. 507 and Justice Maryka Omatsu, "On Judicial Appointments: Does Gender Make a Difference?" in Joseph F. Fletcher, ed., *Ideas in Action: Essays on Politics and Law in Honour of Peter Russell* (Toronto: University of Toronto Press, 1999) 176.

<sup>58</sup> See Constance Backhouse, "The Chilly Climate for Women Judges" (Paper presented to the "Adding Feminism to Law: The Contributions of Madame Justice L'Heureux-Dubé" workshop, Ottawa, September 2002) and Hester Lessard, "Farce or Tragedy?: Judicial Backlash and Justice McClung" (1999) 10 Const. Forum Const. 65.

<sup>59</sup> See generally The Honourable Claire L'Heureux-Dubé, "The Dissenting Opinion: Voice of the Future?" (2000) 38 Osgoode Hall L.J. 495.

<sup>60</sup> *Supra* note 54 at 508. This is an interesting statement from Gold given that his conclusions in this article espouse the contrary view and resonate with my views that split decisions and dissents in *Charter* cases are positive.

<sup>61</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [Law]. Beverley Baines, "Law v. Canada: Formatting Equality" (2000) 11 Const. Forum Const. 65 at 67, describes the consensus as "... a bland, pedantic portrayal of judicial unanimity," as compared to earlier (and later) "... robust factionalism ...." While it lasted, the *Law* consensus led to problematic decisions like *Lovelace v. Ontario (A.G.)*, [2000] 1 S.C.R. 950 and *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703. However, the consensus was short-lived as evidenced by the split decision in *Lavoie v. Canada*, 2002 SCC 23 [Lavoie] that followed not long after.

desirable goal, in the interests of both law and society. But this is not necessarily true with respect to a fundamental rights document, like the *Charter*, and particularly in relation to such an amorphous concept as equality rights, where consensus is likely to be either fleeting or case specific or to reflect a compromised vision and approach.

I think we should look more positively on split *Charter* decisions and dissents. I am often the most disappointed in and wary of unanimous decisions. The desire for unanimous decisions reflects a positivist understanding of law, the idea that the correct interpretation is lying in wait to be found. Such a desire is at odds with the more sophisticated and complex understandings of law generally held by social justice scholars and activists. Multiple judgments more fully reflect our plurality and usually provide a fuller and deeper canvassing of the issues and problems. Multiple judgments may provide better direction to legislatures required to implement the court's decision. According to Gold, "[t]o the extent that a further value of the *Charter* lies in the fact that it precipitates a dialogue between court and legislature, the divisions on the Court can be seen to contribute to a more realistic, flexible and less dogmatic dialogue on issues of rights."<sup>62</sup> Dissents provide hope for those whose rights have not been recognized by the majority. Gays and lesbians have, for example, drawn strength and determination from the strong dissents in cases like *Mossop*<sup>63</sup> and *Egan*, and, with that vision before them, they continued to push to have the discrimination that they face finally acknowledged by the majority in *Vriend*. In the slow incremental process that is law reform, it is often true that today's dissent is tomorrow's majority.<sup>64</sup> This may be particularly the case in areas like equality jurisprudence where we all have a huge amount to learn and integrate into our thinking. As much as I would prefer it if more of the decisions that I agree with were in the majority rather than the dissent, my sense is that a shift to greater consensus and unanimity among members of the Court would mean that the views and positions that I support would become increasingly muted and ultimately invisible.

If one accepts that the significance of *Charter* cases goes far beyond the specific outcome in the case, then multiple decisions provide much

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<sup>62</sup> *Supra* note 54 at 529.

<sup>63</sup> *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 [*Mossop*]; *Egan*, *supra* note 52; and *Vriend*, *supra* note 51.

<sup>64</sup> Sadly, this may be more true than I would like to admit and we may see the positive *Charter* decisions of the last few years become dissents in future cases. For example, the Supreme Court's recent decision in *R. v. Shearing*, 2002 SCC 58 [*Shearing*], is, in my view, a troubling retreat from its earlier decision in *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*].

more fertile ground for public education, mobilizing, and political action. *Charter* decisions are about interpretation, values, and beliefs; it is no wonder that consensus is rare. As the diversity of the Supreme Court expands, we can anticipate greater diversity of perspective and analysis; we should look forward to greater and stronger disagreements and to more concurring and dissenting opinions. The benefits to be derived from academic debate about the *Charter* that I referred to at the beginning of this article apply similarly, in my view, to judicial debate about the *Charter*. While some argue that the rights in the *Charter* “mask fundamental social and political conflicts”<sup>65</sup> under an appearance of shared values and consensus, I think the opposite: that *Charter* rights provide the impetus and grounding to bring these conflicts out into the open—in the court room, in the legislatures, and in the streets. Rather than simply reflecting and reinforcing the established values of the legal system and legal elites, the *Charter* equality guarantee provides a basis from which to try to depose formal equality and individualism from their entrenched positions as dominant values.

## II. THE CASES

I do not intend to discuss, or even refer to, all of the Supreme Court of Canada decisions in which the “sex” ground of section 15 was before the Court because they are not necessarily the most significant sex equality or *Charter* equality cases.<sup>66</sup> Despite the advent of section 15 of the *Charter*, a number of the most important Supreme Court of Canada cases for women over the past twenty years were not *Charter* cases<sup>67</sup> or, although *Charter* cases, were not brought or decided as equality cases.<sup>68</sup> This lack of

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<sup>65</sup> Petter & Hutchinson, *supra* note 14 at 536.

<sup>66</sup> For a comprehensive examination of section 15 cases, see Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 Can. Bar Rev. 299.

<sup>67</sup> See e.g. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (pregnancy discrimination) and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 [*Janzen*] (sexual harassment). For a more recent case see *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union*, [1999] 3 S.C.R. 3 [*BCGSEU*] (aerobic standards for forest firefighters).

<sup>68</sup> See e.g. *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*] (abortion) which was brought and decided as a section 7 *Charter* case, although section 15 was discussed. Section 28 was raised as part of the constitutional questions that were before the Court and was argued by LEAF in its intervenor’s factum, but section 28 was not referred to in any one of the four separate judgments that were issued by the Court. See LEAF, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996).

centrality for section 15 can be seen either positively or negatively. It could be read as support for the argument that equality is an empty, meaningless concept and that section 15 is too abstract and open-ended<sup>69</sup> to be of concrete assistance to women. Section 15 is not central in all of the cases and decisions of greatest significance to women, because equality is not central to the betterment of women's lives. On the other hand, it could be that the impact of the *Charter* and section 15 is much more diffuse and relational—that the Court's understanding of substantive equality for women is filtering into its judgments, lower courts' decisions, and the arguments and expectations of those who appear before the courts. The analysis of substantive equality is not contained by or within the *Charter* or even in the explicit language of equality. Given the similarities in wording and intent, human rights anti-discrimination provisions have, from the beginning, had a strong, interactive relationship with section 15 of the *Charter*. Initially, human rights jurisprudence was employed to steer the Court away from the formal equality model. At the same time, section 15 has presented opportunities to break out of some of the quagmire that was impeding the human rights provisions.<sup>69</sup> This dialectical relationship continues, largely to the benefit of both human rights and *Charter* analysis. This diffuse impact of section 15 may, to a limited extent and on a practical level, mitigate the restriction of the *Charter's* application to state action; the *Charter* is, at least indirectly, affecting the private sector. But the fact that such impact is indirect and "private" may at the same time serve to reinforce the public/private dichotomy on the symbolic level.

I will discuss the cases under the following substantive headings: reproduction, violence against women, family, employment, and socio-economic claims, recognizing that these categories overlap significantly and do not account for all of the cases.

#### A. *Reproduction*

Abortion is one area in which our elected representatives and the institution of democracy have shown themselves remarkably undemocratic. Neither federal nor provincial governments under a range of leaderships were willing to introduce legislation to eliminate (federal) or circumvent (provincial) the *Criminal Code*<sup>70</sup> restrictions on abortion that were in effect until 1988. No government was willing to go out on the political limb of

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<sup>69</sup> For example, the impossible distinction between direct and indirect discrimination that was finally dismantled in *BCGSEU*, *supra* note 67.

<sup>70</sup> R.S.C. 1985, c. C-46, s. 251.

respecting and supporting a woman's right to choose abortion, despite the fact that the majority of Canadians support such a position. Politicians apparently feared taking sides on such a highly charged issue and risking the ire of voters for whom this would be a decisive factor. The fact that the federal government has only made a single, feeble attempt to reintroduce restrictions on abortion since the Supreme Court struck down the *Criminal Code* provision on abortion indicates that this fear, now operating in reverse, and not a principled position on the issue of abortion, was likely the inhibiting factor for a number of politicians. Before the advent of the *Charter*, pro-choice advocates were stalled by governments' unwillingness to act; the *Charter* opened the door for movement forward on this issue.

There have been at least three *Charter* cases dealing with abortion, all of which were among the early *Charter* cases to come before the Supreme Court of Canada.<sup>71</sup> Abortion is quintessentially a gender-specific issue. As such, and because its genesis is biological, abortion gives rise to the dangers of essentialist argument and decision making. Is it possible to ground the gender-specific argument in a social context that reflects the role played by biological difference without essentializing it? Is this a sex equality argument? Is it a section 15 argument? From an anti-choice perspective, the issue is solely the recognition of fetal rights; gender is irrelevant because the woman is irrelevant. From a fathers' rights perspective, often articulated in conjunction with the fetal rights position but actually in some ways contradictory to it, the issue is gender equality based on a formal equality model. This is a somewhat difficult argument to mount. Given the biological differences between a pregnant woman and a man who self-defines as a parent, it is difficult to see the likeness between the two on which the formal equality model could be imposed.

The decision in *Morgentaler* is, in terms of its outcome, a huge step forward for women. The decision struck down the *Criminal Code* prohibition of abortion and eliminated the humiliating, delaying, and inequitable process that women were required to undergo in order to

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<sup>71</sup> The other two Supreme Court decisions on abortion have not added to or revised the extensive discussion of the issues in *Morgentaler*. *Borowski v. Canada (A.G.)*, [1989] 1 S.C.R. 342, an action to strike down subsections of the *Criminal Code* abortion provision so as to leave only the prohibition of abortion standing, was found to be moot in light of the *Morgentaler* decision. *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 raised the issue of the right of the would-be father of the fetus to be granted an injunction against the pregnant woman seeking an abortion. The father's claim was dismissed under Quebec's *Charter of human rights and freedoms*, R.S.Q. c. C-12, and the federal *Charter* was held not to apply to a private claim. In addition, there have been other cases addressing reproductive issues. *R. v. Sullivan*, [1991] 1 S.C.R. 489 dealt with the status of a fetus in the context of criminal charges laid against midwives; *Winnipeg Child and Family Services (Northwest Area) v. D.F.G.*, [1997] 3 S.C.R. 925 dealt with the application of child protection provisions to a fetus.

obtain a legal abortion in Canada. The decision, however, is what Fudge describes as a “narrow ... victory”<sup>72</sup> in that it did nothing to resolve any of the myriad problems that deny many women access to safe abortion in Canada. Given the procedural focus of the section 7 analysis, the case contains a great deal of discussion about access problems, but there is no reference to the socio-economic context of these access issues that have a disproportionate and negative impact on poor and low-income women. *Morgentaler* does lay some foundation for these arguments, and the decision is a necessary first step in ending the legislative stalemate so that the issue of the state’s obligation to provide access to abortion services can be pursued on the political front, as well as possibly through litigation.

In terms of analyzing and recognizing women’s equality rights, the case is disappointing, posits some problematic propositions, largely avoids the most difficult questions, and offers few rays of hope. It is narrowly focused; there is no discussion of the forced abortions to which young women, racialized women, women with disabilities, and poor women are frequently subjected. As one would expect, the Court was divided on both outcome and approach to the issue. There were four different judgments issued, with Justice Bertha Wilson, the lone woman on the Court, the only one to stand alone in her judgment. The case was decided on the basis of section 7 of the *Charter*—the right to life, liberty, and security of the person and the right not to be deprived of any of these except in accordance with principles of fundamental justice. The Crown’s primary argument in support of the legislation was one of deference. All of the judges accepted that the state has an interest in the protection of the fetus but none felt obliged in the context of this particular case to fully investigate that interest or to determine what limits, if any, that interest might justify imposing upon a pregnant woman’s decision to terminate her pregnancy. Justice Wilson went the furthest in this discussion, proposing that the state’s interest in protecting the fetus is greater at later stages of pregnancy.

Pro-choice supporters, understandably, have been concerned by this recognition of a state interest in protecting the fetus and fear the repercussions for women. So far, fetal rights arguments have been pursued in a number of different contexts but have not ultimately been successful.<sup>73</sup> I share these concerns. At the same time, feminist analyses of abortion have developed beyond a simplistic choice argument to recognize the complications of race, class, and disability and to acknowledge the difficult and painful dilemma that the abortion decision presents for most women.

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<sup>72</sup> Fudge, *supra* note 45 at 55.

<sup>73</sup> See cases *supra* note 71.



Differing views about the fetus are part of this dilemma and need to be incorporated into feminist abortion analysis. I am more concerned by the language in *Morgentaler* of balancing the state's interest in protecting the fetus against the rights of the pregnant woman. To see these rights as in conflict rather than as inextricably interrelated undermines the pregnant woman's bodily integrity and autonomy.

The section 15 argument that the *Criminal Code* prohibition of abortion, except in limited circumstances, infringed women's equality rights was summarily dismissed by the two dissenting judges in *Morgentaler* and not addressed by the other judges. Unavoidably, the language throughout refers to women and to pregnant women, but, with the exception of Justice Wilson, this was not enough to induce the Court to address abortion as a gendered issue and to inquire into the sex equality implications of the impugned law.<sup>74</sup> In a passage that has been extensively quoted by feminists and is hailed as a *Charter* high point by many, Justice Wilson provided a powerful discussion of the gendered nature of the abortion decision:

This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma.<sup>75</sup>

Justice Wilson directly places this discussion in the context of women's struggle for human rights, not as part of the earlier struggle to fit into the man's world, but as part of women's more recent struggle to recreate societal structures to include their needs and aspirations. In this context, "[t]he right to reproduce or not to reproduce ... is one such [protected] right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being."<sup>76</sup> In

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<sup>74</sup> This disturbing reluctance on the part of the Court to explicitly frame an issue as one of sex equality, even when a substantive sex equality analysis is applied, runs throughout the *Charter* cases. For a recent example, see *Shearing*, *supra* note 64, where the issue is framed exclusively as one of privacy rather than one of sex equality.

<sup>75</sup> *Morgentaler*, *supra* note 68 at 171.

<sup>76</sup> *Ibid.* at 172.

this discussion of abortion, Justice Wilson meets the difficult challenge of grounding the gender-specific argument in a social context that reflects the role played by biological difference without essentializing it. Although she does not engage in this discussion in relation to sections 15 or 28, this is one of the best and strongest articulations of a substantive equality analysis that we have had from the Court to date. It is contextual, focused on inequality, and premised on women's experiences. The context is the human rights context of women's inequality and the history of women's struggle to be admitted as distinct persons within that context. There is no need for a comparator group; in fact, attempts to find a comparator group would undermine this analysis. Substantive equality is about recreating society and societal structures to incorporate "differences," not to distort them, appropriate them, reject them through objectification or denial, merely "accommodate" them, or assess them against some presumably "un-different" comparator group.

#### B. *Violence Against Women*

Violence against women is probably the area in which section 15 has been most frequently argued before the Supreme Court of Canada. From the early decision in *Hess*, challenging the constitutionality of the gender-specific absolute liability offence of sexual intercourse with a girl under fourteen, to the most recent decision in *Shearing*, relating to the cross-examination of a complainant in a sexual assault trial on her diary entries, there have been at least a dozen sexual assault cases in which sex equality has been referred to and has clearly informed the analysis.<sup>77</sup> Most of these cases involve the admissibility and use of confidential records relating to the complainant. If pornography is included as a form of violence against women, the number of Supreme Court *Charter* cases in this area rises to fifteen.<sup>78</sup>

Sexual assault is an area where there has been much interchange

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<sup>77</sup> It is perhaps self-serving to say this because I have been an active participant in the work of LEAF since its inception in 1985. But I think that the Court's positive movement over the course of these sexual assault cases and its greater, albeit hesitant and not unanimous understanding of the gendered nature of the problems that infect the law's handling of sexual assault are in large part due to the arguments LEAF has put forward in its interventions in these cases and its related advocacy work. It intervened before the Supreme Court in over half of the sexual assault cases and in two of the three pornography cases.

<sup>78</sup> As there is a separate article on sexual assault and the *Charter* in this issue, I will make only a few general comments on the topic. See Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 Osgoode Hall L.J. 251.

between the courts and Parliament, a situation that existed before the *Charter*<sup>79</sup> and has continued throughout the time of the *Charter*. The relationship has generally been one of Parliament providing some protection to women against the evidentiary abuses to which they have been subjected in sexual assault trials and the courts clawing back some of these protections in the name of the fair trial rights of the accused. Over time, Parliament has become more explicit in its equality rationale for these provisions. Amendments to the *Criminal Code* relating to sexual assault made in the last ten years have each contained a preamble that explains the gendered social context that gives rise to sexual assault and the gender issues that need to be taken into consideration in applying the new legislation.<sup>80</sup> Somewhat reluctantly, at least for some justices, the Supreme Court of Canada increasingly has been willing to explore the gendered assumptions and values underlying the evidentiary issues. This process culminated in the almost unanimous<sup>81</sup> decision in *Mills* in which the statutory protocols for the admission of confidential records pertaining to the complainant in a sexual assault trial were upheld. However, the more recent decision in *Shearing* represents a step backwards. The majority ruled that the accused could not cross-examine the complainant on the absence of entries in her diary relating to the abuse in order to raise the presumption that if it was not recorded it must not have happened. Then, in a sleight of hand, the majority ruled that the accused can cross-examine the complainant on the absence of entries in her diary in order to test the accuracy and completeness of her recollection of the events around the time that she was abused.<sup>82</sup>

It is impossible to know yet whether *Shearing* is an aberration or the beginning of a backslide into ignoring or downplaying women's equality interests in the context of sexual assault trials. I fear that the Court believes that it has now purged itself and the law of the erroneous and damaging assumptions, myths, and stereotypes about women's sexuality and women's reactions to having been raped that infused the rules of evidence and have

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<sup>79</sup> See Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984).

<sup>80</sup> See *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c.38; *An Act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c.32; and *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c.30. These lengthy preambles refer explicitly to the prevalence of sexual violence against women and children and to the particularly disadvantageous impact of violence on the equal participation of women and children in society and on the *Charter* rights of women and children, with specific mention of sections 7, 15, and 28.

<sup>81</sup> Justice Lamer dissented in part.

<sup>82</sup> Justices L'Heureux-Dubé and Gonthier dissented on this point.

continued to infect defence presentation and judicial decision making long after the rules were revised.<sup>83</sup> I fear that the Court will no longer feel the need to engage in a rigorous sex equality analysis in this area and will tune out these arguments when presented by counsel. I fear that the Court believes it has eliminated the sexual inequalities relating to sexual assault such that it can now revert to being dealt with as a gender neutral-offence. These fears are greatly exacerbated by the retirement of Justice L'Heureux-Dubé, who has been a champion of women's equality rights. Her sexual assault judgments, often in dissent, are wonderfully affirming for feminist advocates who work on this issue. She gradually has pushed the Court to be able to understand and accept a gendered equality analysis in this area. Section 15 provided the foundation for a judge to publicly recognize, as did Justice L'Heureux-Dubé, that:

Parliament exhibited a marked, and justifiedly so, distrust of the ability of the courts to promote and achieve a non-discriminatory application of the law in this area [sexual assault] .... My attempt to illustrate the tenacity of these discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament.<sup>84</sup>

Justice L'Heureux-Dubé has paid a huge price, in terms of vicious and personalized critique and public scorn, for her outspoken support for women's equality rights, particularly in the sexual assault context. With this kind of public controversy swirling around a sex-equality analysis in the context of rape, it is hard to credit the argument that the *Charter* depoliticizes the issues that come under its shadow.

### C. *Family Law*

All family law cases are sex equality cases, including those arising between lesbians or gay men or involving bisexuals or transgendered persons. By this I mean that the family is a thoroughly gendered institution; it is premised on a gendered division of labour that permeates every aspect of family life. This is our inheritance—the family as fundamentally a gender construct from which it is very difficult to escape. The law has reflected and perpetuated the gendered family and only recently has there been a

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<sup>83</sup> Justice McClung's decision in *R. v. Ewanchuk*, [1998] 6 W.W.R. 8 (Alta. C.A.), and the responses it generated are glaring examples that these anti-woman views are still very much in operation among judges and among the public.

<sup>84</sup> *Seaboyer*, *supra* note 40 at 707. See also Lessard, *supra* note 58 and Joanne Wright, "Consent and Sexual Violence in Canadian Public Discourse: Reflections on *Ewanchuk*" (2001) 16 C.J.L.S. 173.

concerted effort, led by feminists, to introduce equality into the family and into family law. Ironically, those efforts have led to a gender-neutral approach to family law that belies its underlying gendered foundation, as well as the gender-based expectations and assumptions that inform our readings of the family. We are seeking to impose a gender-neutral solution on a gendered problem, all the while still trapped in our own gendered assumptions and judgments.

I am going to focus my discussion of the *Charter* and family law almost exclusively on the opinions in *M. v. H.*<sup>85</sup> because they reflect an interesting and important debate over the gendered nature of family law that has potentially far-reaching implications for future sex equality-based claims. In this case, M. brought a section 15 challenge against the definition of "spouse" in Ontario's *Family Law Act*<sup>86</sup> that had the effect of extending the right to support upon relationship breakdown to members of opposite-sex couples but not to same-sex couples. The challenge, brought on the analogous ground of sexual orientation, was successful in overturning the heterosexual definition of spouse.<sup>87</sup> Although the action was between two separated lesbian partners, the fact that the parties were both women was not a factor in the case.<sup>88</sup> Gender was, however, a major subtext. Gender

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<sup>85</sup> *M. v. H.*, [1999] 2 S.C.R. 3 [*M. v. H.*].

<sup>86</sup> R.S.O. 1990, c. F-3.

<sup>87</sup> The decision is emphatically limited to this narrow ground. The frequency with which the Court insists that this case is not about the right to marry—that this appeal "has nothing to do with marriage per se," that marital rights and obligations "play no part in this analysis," that "there is no need to consider whether same-sex couples can marry," all statements made within a single page (at 48-49) and as part of the introduction to the section 15 analysis—is staggering. The decision clearly has implications for the right to marry and will be used to further the argument for that right. While this case does not decide that issue, it is not unrelated to it, as is clear from Justice Gonthier's dissent and his concern that "a constitutionally mandated expansion of the definition of spouse would open the door to a raft of other claims" (at 90) and from Justice Bastarache's comments relating to the possibility that the implications of the decision in this case may be greater than initially anticipated (at 157). The Court's discomfort with the homosexual marriage question is palpable and disconcerting, and is indicative of the entrenched position of the institution of heterosexual marriage. But the Court will have to deal with the right of gays and lesbians to marry and I sincerely hope that when it does, there is a gender analysis brought to bear on the question. The right to marry is a contentious issue among lesbian feminists because marriage has been, and arguably still is, an oppressive institution for women. From my perspective, a gendered analysis leads to the conclusion that it is not appropriate for the state to endorse marriage for anyone at all. This would leave the right to marry open to anyone but would divest it of legal significance. The state would continue to apportion rights and obligations incurred as a result of intimate and other relationships in which economic dependency may arise.

<sup>88</sup> I think that this is appropriate—the fact that this was a lesbian couple, not a gay male couple, is irrelevant to the analysis. But I do think that the question of the potential relevance and impact on the suspect categories of discrimination should always be asked as an essential component of a substantive equality analysis.

enters into the case in the discussions of the purpose behind the state requiring that in some circumstances one party pay support to the other upon relationship breakdown. Justice Peter Cory, writing for a majority that included both women on the Court, made the following statement:

It is true that women in common law relationships often tended to become financially dependent on their male partners because they raised their children and because of their unequal earning power. But the legislature drafted s. 29 [the definition of spouse at issue] to allow either a man or a woman to apply for support, thereby recognizing that financial dependence can arise in an intimate relationship in a context entirely unrelated either to child rearing or to any gender-based discrimination existing in our society.<sup>89</sup>

While Justice Cory's caveat is accurate, it does not detract from the fact that the need for spousal support flows primarily from the gendered division of labour within the family and from gender inequities outside the family.<sup>90</sup> There is no need to de-gender the analysis of support in order to extend the right of support to lesbians, just as, for example, there is no need to de-gender the analysis of sexual harassment in order to recognize that it can and does occur on a same-sex basis.<sup>91</sup>

Justice Frank Iacobucci, in his half of the majority judgment dealing with section 1 of the *Charter*, uses the family law reforms that feminists fought for to justify his contention that the support provisions are no longer premised on gender inequalities, that is, that the gender problem has been fixed.<sup>92</sup> This is a classic example of some progress on an issue masking the continuing existence of the problem. This position demonstrates the critique of the *Charter* as being infused with an ideology of formal equality that functions so as to neutralize ongoing inequalities. However, as Justice Iacobucci's discussion reflects, the critique is not unique to the *Charter* but is a function of the incremental progress itself. The same problem potentially arises with respect to any gains made to improve a subordinated group's situation such that the gain is seen as the equality solution rather than a small step toward equality. The more successful we are on the

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<sup>89</sup> *Supra* note 85 at 48.

<sup>90</sup> Contrary to the implications of Justice Cory's statement, I expect that most men who are claiming spousal support are doing so because they have undertaken primary responsibility for the traditionally female tasks of child and home care.

<sup>91</sup> This is something the Supreme Court recognized in *Janzen*, *supra* note 67.

<sup>92</sup> *Supra* note 85 at 64-69. For a feminist critique of these reforms as exacerbating the more severe gender inequalities by furthering the property interests of middle- and upper-class women at the expense of the support needs of lower-income and poor women, see Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991), c. 3.

preliminary issues, the more difficult it will be to get at the more entrenched and systemic equality issues. This will be particularly true when the equality issues involve intersectional inequalities.

Justice Charles Gonthier takes the position opposite to that endorsed by the majority in *M. v. H.* and asserts that the purpose of the legislation is exclusively related to sex:

The primary purpose of the *FLA* is to recognize the social function specific to opposite-sex couples and their position as a fundamental unit in society, and to address the dynamic of dependence unique to men and women in opposite-sex relationships. This dynamic of dependence stems from this specific social function, the roles regularly taken by one member of that relationship, the biological reality of the relationship, and the pre-existing economic disadvantage that is usually, but not exclusively, suffered by women.<sup>93</sup>

Almost all of the concerns raised by the *Charter* critics are present in this one judgment—biologism, essentialism, heterosexism, abstraction, a lack of gender analysis, and a lack of equality analysis. The *Charter* is only as progressive as those applying it. When judges are mired in stereotypes, they can only perpetuate those stereotypes, even in the name of equality.

Justice Michel Bastarache is the only judge to engage in a gender analysis of the purpose of the legislation and to acknowledge the glaring reality of gender inequality that the legislation was designed to address. He finds that “[t]he primary legislative purpose in extending support obligations outside the marriage bond was to address the subordinated position of women in non-marital relationships.”<sup>94</sup> In this specific context, women’s subordinated position relates to their generally more vulnerable economic situation, often worsened as a result of the relationship, leaving them economically disadvantaged after its breakdown. However, sex is not an absolute proxy for gender<sup>95</sup> and other inequalities may give rise to relationship-based economic dependencies. There is no justification for excluding others who might similarly find themselves in a situation of economic disadvantage related to the relationship upon its breakdown. When that exclusion is premised on a prohibited ground of discrimination, as in this case, the section 15 claim should be successful. Justice Bastarache found the middle ground of gender analysis between the extreme positions that gender is no longer relevant at one end of the spectrum and that sex is determinative at the other end. Family law may be particularly prone to

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<sup>93</sup> *Supra* note 85 at 104.

<sup>94</sup> *Ibid.* at 189.

<sup>95</sup> Sex is the biological division and gender is the socially constructed division. There is significant overlap but the terms are not synonymous.

these extreme interpretations and it may be difficult to find that middle gender ground. We need to be able to use the *Charter* to move beyond this dichotomy to recognize the centrality, but not exclusivity, of gender as mediated by other social factors.

It is disconcerting that the majority of the Court in *M. v. H.* felt the need to de-gender support. I am concerned about what this means for future analysis of family law issues. Family law desperately needs a comprehensive substantive equality analysis; it is an area in which such an analysis would no doubt be complex and contradictory. Yet family law is an area in which the applicability of the *Charter*, as well as its application, have been held to be uncertain<sup>96</sup> and thus where the critique that the *Charter* reinforces the private/public sphere dichotomy may be apt. Although we may not want the *Charter* to intervene at the microcosmic level of individual family disputes, we do need the *Charter* to apply to the legal rules and procedures that govern those breakups to ensure that gender inequities are addressed, not perpetuated or exacerbated. And this is one of the places where the public/private distinction breaks down. It is an area in which:

[t]he private sphere has been, more often than not, an area where proxies for state power have been issued to designated actors whose status and role within the family privileges them as enforcers or conduits for social norms and values. Men, in their roles as heads of households—husbands and fathers—have historically employed and enjoyed reflected state power in this regard.<sup>97</sup>

The legal rules are not just the state-enacted laws; they are also the assumptions and presumptions that lie behind the interpretation and application of the law and that help create the law. These are the pieces that are extremely difficult to get at—because they are often not articulated, because they are so taken for granted and assumed to be true, because they can be difficult to argue against, and because they are “private.” These are the pieces that a gender analysis needs to unpack and that the state/law “public” focus of the *Charter* may sometimes protect.

#### D. *Employment*

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<sup>96</sup> See e.g. *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 and *Young v. Young*, [1993] 4 S.C.R. 3, which are confusing decisions relating to the application of the *Charter* to the “best interests of the child test” in which the majority decisions were that the *Charter* did not apply or that there was no *Charter* violation. The “best interests of the child test” is exactly the kind of positive-sounding family law rule that cries out for a thorough gender-equality analysis.

<sup>97</sup> Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (New York: Routledge, 1995) at 15.



Employment is the flip side of the family—the public sphere where women have always been, but until recently, have been largely invisible. The workplace, long considered man's exclusive domain, has been modelled on the traditional male worker who, when he commences work as an adult, does so full-time and permanently. He does not take time out to bear or raise children, to accommodate a partner's work demands, or for any other reason. Women have had to fight hard to be recognized as legitimate and committed workers with perhaps different needs, aspirations, ways of working, and priorities than their stereotyped male counterparts.<sup>98</sup> Every victory that women have won in the employment context has been a begrudging accommodation of women's "differences"; there has been no revisioning of the workplace as a multi-gendered-abled-raced-aged-sexual-orientated place. Section 15 of the *Charter* provides the grounding to make such revisioning arguments, but the potential here is severely restricted by the *Charter*'s limited application.

It is in relation to employment that the *Charter*'s restriction to state action is most problematic, where the myth of the public (as in state)/private (as in sector) divide most needs to be challenged in the interests of equality. In this era of globalization, corporations and organizations wield as much, and some would argue even greater, power as the state; they intervene and control people's lives and livelihoods in significant and pernicious ways.<sup>99</sup> The inability to use the *Charter* to directly challenge the entrenched inequalities on which this power is based and which it perpetuates is a serious shortcoming. *McKinney v. University of Guelph*,<sup>100</sup> addressing the issue of mandatory retirement in the university context, is a good example of the absurdity of this private/public distinction. Over half of this 110-page decision is taken up with detailed and convoluted discussions of whether universities constitute government for the purposes of *Charter* application when it seems patently clear that the issue of mandatory retirement is far from a "private" matter. It is a social issue of general concern, as is evidenced by the number of cases brought before the courts challenging mandatory retirement provisions, the extensive discussions engaged in by the courts on the question, and the types of

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<sup>98</sup> Many men do not fit or do not want to fit the traditional male worker model either.

<sup>99</sup> See e.g. Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (Toronto: Vintage Canada, 2000).

<sup>100</sup> [1990] 3 S.C.R. 229 [*McKinney*].

arguments put forward in its defence and in the challenges to it.<sup>101</sup>

The *Charter*'s equality guarantee should be recognized as requiring consideration of potential impacts of mandatory retirement on the range of diverse employees. These issues were raised to a very limited extent by Justice L'Heureux-Dubé in *McKinney*. She rejected the all-too-frequently made argument that a practice should be preserved simply because it is deeply entrenched in our society, and that somehow, because of the longevity of a specific policy or practice, we should be precluded from inquiring into its discriminatory foundations and/or impact. Such a hands-off approach protects the most deeply systemic and insidious forms of inequalities by neutralizing and naturalizing them. From this point, L'Heureux-Dubé went on to address the disparate impact of mandatory retirement policies on poor people and on women in particular:

The fact that "mandatory retirement has become part of the very fabric of the organization of the labour market in this country" is inapposite to the present analysis in so far as it ignores the promulgation of both the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code, 1981* ... . The adverse effects of mandatory retirement are most painfully felt by the poor. The elderly often face staggering financial difficulties ... .

[W]omen are particularly affected by this deficiency. Upon attaining the age of 65, women often have either lower or no pension income since a greater proportion of them are in jobs where they are less likely to be offered pension plan coverage. Women are more susceptible to interrupted work histories, partly as a result of childcare responsibilities, thereby losing potential pension coverage. Furthermore, women are prone to have lower lifetime earnings upon which pension benefits are based.<sup>102</sup>

Justice Wilson wrote her own reasons but expressed substantial agreement with Justice L'Heureux-Dubé with respect to her section 1 analysis. The two women judges were the two dissenters in this case and would have struck down the mandatory retirement provisions, at least in part because of their negative disparate impact on women and people with low incomes.

It should not be surprising, given the inability to employ the *Charter* to directly challenge the discriminatory employment practices of "private" employers or to compel them to address systemic inequalities in their workplaces, that there are very few section 15 sex equality employment cases and that, to date, the cases that have been brought mostly deal with

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<sup>101</sup> See e.g. *Saskatchewan (H.R.C.) v. Saskatoon (City of)*, [1989] 2 S.C.R. 1297; *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103.

<sup>102</sup> *Supra* note 100 at 433-34 [footnotes omitted].

employment insurance benefits.

In *Schachter*,<sup>103</sup> the Court held that the provision of unemployment insurance benefits to adoptive parents and not to “natural” parents constituted a breach of section 15 of the *Charter*. The choice to base the challenge on this distinction and not on the gender distinction related to the provision of maternity benefits in the absence of paternity benefits is interesting on a number of levels. If the section 15 claim had been based on sex, the arguments might have been more interesting and contentious because of the differences that exist between the biological mother and biological father that do not exist between adoptive parents and the biological father. While the risk of the Court opting to strike down maternity benefits, leaving women who have just born a child vulnerable to the demands or decisions of their employers or union negotiators, might have been low, the consequences for women of such a decision would have been devastating.<sup>104</sup> The comparator group chosen in *Schachter* was the appropriate one, in this case, not despite but because it was the one that gave rise to a formal equality analysis. This case puts the lie to the notion that formal and substantive equality are in conflict and a formal equality analysis is always a problem and to be avoided.<sup>105</sup>

The focus of the Supreme Court of Canada in *Schachter* was on remedy. The Court’s recognition of the inappropriateness of striking down an under-inclusive positive benefit provided by the state and of reading in as a legitimate *Charter* remedy was a very positive step, even while the limited nature of that remedy was a disappointment. The Court’s unwillingness to extend state benefits was disheartening, at least for those of us less concerned about judicial activism. Parliament chose to amend the impugned legislation by reducing the benefits from fifteen to ten weeks and extending them to include natural as well as adoptive parents. Equality activists frequently argue that the equality measures we advocate will not mean a reduction for others but are aimed only at bringing those who have been kept behind up to the prevailing standard. That was clearly not the case in *Schachter*. Biological parents benefitted but adoptive parents lost part of their benefits. This case illustrates the need for feminist advocates to address these issues directly and not pretend that they are cost-free. We

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<sup>103</sup> *Schachter v. Canada*, [1992] 2 S.C.R. 679 [*Schachter*].

<sup>104</sup> Women in the United States have had a terrible time attaining maternity leave protection and paid benefits and the impact on mothers in the paid workforce has been devastating.

<sup>105</sup> Possibly when there is an obvious comparator group, formal equality is the appropriate analytic approach, and a substantive equality analysis should be applied when there is no such readily apparent comparison and the comparative focus should be diffused or even abandoned.

need to provide the economic analysis of where the money should come from for the programs we advocate, not leave it to government to cut back on existing programs to finance *Charter*-required programs. In these times of tax cuts and deficit reduction as fiscal priorities, there needs to be a countervailing voice arguing for higher taxes directed to social programs.

There are at least two section 15 *Charter* cases currently before the Federal Court of Appeal challenging different aspects of the *Employment Insurance Act*<sup>106</sup> on the ground of sex.<sup>107</sup> In these cases, the female plaintiffs are claiming that the unemployment benefits scheme is the mirror image of the male-based model of employment, premised on the same assumptions and values and thus giving rise to similar sex-discrimination problems. I think we can expect to see some of these cases coming before the Supreme Court in the not too distant future. Given government cutbacks and the impossible economic circumstances that so many women face, there will no doubt be increased *Charter* challenges relating to employment and to socio-economic issues more generally.

#### E. *Socio-Economic Claims*

While the courts have been doing poorly on socio-economic rights claims, the legislatures have been doing worse, forcing groups to go to the courts to seek redress against drastic government cutbacks and draconian revisions to social programs. The courts have largely failed in providing that redress. Poverty is one of the most glaring inequalities of Canadian contemporary society and is intimately interrelated with the other section 15 grounds. Assumptions and stereotypes about poor people abound and the disadvantages under which they have historically laboured are exacerbated at every turn. But the courts have, for the most part, refused to find socio-economic status or related economically situated inequalities to constitute analogous grounds under section 15.<sup>108</sup>

Socio-economic rights will prove to be the most significant and most difficult *Charter* battleground. They involve the assertion of positive rights which the courts have been very reluctant to recognize. Refusal to fully engage with these claims is refusal to engage with the disparate impact

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<sup>106</sup> S.C. 1996, c. 23.

<sup>107</sup> *Canada (A.G.) v. Lesiuk* (November 2002), A-281-01 (F.C.A.) (relating to part-time workers' eligibility for benefits) and *Miller v. Canada (A.G.)*, 2002 FCA 370 (relating to the impact of the receipt of maternity benefits on a woman's eligibility for regular benefits).

<sup>108</sup> See Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 C.J.W.L. 185.

of poverty that permeates so many other *Charter* equality claims. As Martha Jackman argues, the denial of such rights is itself a *Charter* infringement: "traditional distinctions between classical or negative rights, and social and economic or positive rights, and the willingness to provide for judicial enforcement of one, but not the other, operate in fact to discriminate against the poor."<sup>109</sup>

In the *Charter* context, claims to socio-economic rights by people who live in poverty are an assertion of social responsibility that, if successful, will cost society money. Although there have been situations in which the Court has granted a positive right and effectively required the payment of the benefit requested,<sup>110</sup> in the majority of such cases, the Court has refused the application. And public sentiment is very much in accord with this fiscal restraint, focusing on individualized self-protection, while distancing and blaming less privileged others. Contrary to the *Charter* critics, this is an area in which we need judges to be willing to be activist, to refuse to defer to right-wing parliamentary agendas so as to allow discriminatory programs to continue, and to take action themselves in the social services vacuum. Some provincial human rights codes do provide some protection against discrimination on a ground related to the receipt of social assistance.<sup>111</sup> The painfully tortured process of the recognition of sexual orientation as an analogous ground, based in part on its inclusion in human rights legislation, offers some hope for the eventual recognition of some grounds related to socio-economic status under the *Charter*.

However, this hotly contested recognition would largely only be band-aid work to protect social programs relating to health, education, and social assistance that are being eroded or dismantled. The *Charter* cases brought to date have not argued for a more fundamental economic revisioning that would seriously challenge the huge disparities in income and wealth in this country. Some would argue that to use the *Charter* for such radical purposes that are so contrary to dominant economic attitudes would undermine the *Charter's* credibility and therefore its utility in furthering more modest gains and protections; others would argue that this is the purpose of the *Charter* and its guarantee of equality, and if it cannot be employed to promote larger social justice goals, it is only shoring up a damaged and damaging system. To date, the claims have been very modest

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<sup>109</sup> Martha Jackman, "What's Wrong with Social and Economic Rights?" (2000) 11 N.J.C.L. 235 at 243.

<sup>110</sup> See e.g. *Schachter*, *supra* note 103 and *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624.

<sup>111</sup> See *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) [*Falkiner*].

and the gains almost non-existent.

*Symes*<sup>112</sup> was a modest claim that nonetheless was unsuccessful. The Court found that the inability of a self-employed mother to deduct her full child care expenses as a business expense was not a violation of her section 15 equality rights. The two women judges sitting on the case dissented. This case has been critiqued by feminists as an example of privileged women trying to take advantage of a privileging tax system in a way that potentially undermines the interests of other, more disadvantaged, women.<sup>113</sup> This criticism is consistent with the traditional left concerns with the *Charter*. But in some ways, these critiques have hampered the use of the case and the decisions themselves to critique a tax system that concerns itself only with horizontal equity and reinforces, and often exacerbates, vertical inequities. The criticisms have been misdirected to the claim and the claimant, instead of raising the larger and more fundamental critiques implicit in the claim. The majority and dissenting opinions clearly expose some of the inequalities of our tax system, relating to class as well as to gender. The case can be read as either a challenge to that system or a shoring up of that system. I prefer the former reading and, while the challenge was only partial, and unsuccessful even at that, it laid the groundwork for further and more extensive challenges.

A related criticism of *Symes* is that it was premised on a similarly situated analysis. While this is true, it is a function of the ongoing understanding that equality analysis requires a comparator group, a problem from which none of the section 15 cases have broken free. The concern that, despite the language of substantive equality, section 15 remains mired in a formal equality analysis is a legitimate one. To the extent that the majority of the Court can make statements like the following, that concern is painfully borne out: “[u]nfortunately proof that women pay social costs [of child care] is not sufficient proof that women pay child care expenses.”<sup>114</sup> A substantive equality analysis would make the connection between social costs and financial outlay. However, those social costs and the realities of working mothers’ lives were a significant part of the evidence put forward in the case and were there to be dealt with by the judges, as well as by case commentators and social activists; the basis for a

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<sup>112</sup> *Symes v. Canada*, [1993] 4 S.C.R. 695 [*Symes*].

<sup>113</sup> See Audrey Macklin, “*Symes v. M.N.R.: Where Sex Meets Class*” (1992) 5 C.J.W.L. 498.

<sup>114</sup> *Symes*, *supra* note 112 at 765.

substantive equality analysis was there.<sup>115</sup>

There are a number of important social assistance cases now coming before the Supreme Court of Canada. *Gosselin*,<sup>116</sup> an age-based challenge to the requirement under Quebec's social assistance regulations that single people under thirty deemed to be employable could only receive full regular benefits if they participated in employment and training programs, has been heard but the decision has not yet been released. Inability, seen as a refusal to participate in these programs, reduced social assistance benefits to \$170 a month. Distinctions between the deserving poor and the undeserving poor are becomingly increasingly overt and the punitive measures taken against those perceived to be undeserving are chilling. The death of Kimberly Rogers while serving her prison sentence for welfare fraud in her own home and under a commuted lifetime ban from social assistance, is only one of the more extreme and highly public examples of the impact of these measures.<sup>117</sup>

Leave to appeal to the Supreme Court of Canada in *Falkiner* has been requested. The Ontario Court of Appeal in *Falkiner* struck down the "spouse in the house rule" that had been eliminated by the Ontario government in 1986 in response to a *Charter* challenge and then was reintroduced in 1995. The rule derives from the expansive definition of spouse that includes persons living together who have "a mutual agreement or arrangement regarding their financial affairs" and for whom "the social and familial aspects" of their relationship amount to cohabitation. The four applicants were all single mothers who had been living with a man in a "try-on" relationship for less than a year. The imposition of the "a man living in the house is defined as a spouse" rule had the effect of deeming the applicants to be in spousal relationships of presumed economic interdependence and, on this basis, reducing their benefits as sole support parents. The related appeal of Mr. Thomas, heard at the same time as the *Falkiner* appeal, involved a man with a disability losing his benefits as a permanently unemployable person under the same deemed spouse definition. Poverty provides the link between the inequalities associated with femaleness, single parenthood, and disability. Justice John Laskin, writing for a unanimous court, accepted the multiple-grounds approach and

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<sup>115</sup> It is interesting in this regard to note that Justice L'Heureux-Dubé has referred to *Symes* as containing the first use of substantive equality in a Supreme Court decision. See The Honourable Claire L'Heureux-Dubé, "A Conversation About Equality" (2000) 29 Denv. J. Int'l L. & Pol'y 65 at 69, n. 20.

<sup>116</sup> *Gosselin c. Québec*, [1999] J.Q. No. 1365 (C.A.) (QL).

<sup>117</sup> For information on this case, see [http://dawn.thot.net/Kimberly\\_Rogers](http://dawn.thot.net/Kimberly_Rogers).

held that the definition of spouse imposed differential treatment on the applicants "... on the combined grounds of sex, marital status and receipt of social assistance."<sup>118</sup> If this decision and approach are upheld by the Supreme Court, it would be a giant step forward in the recognition of socio-economic rights. The acceptance of receipt of social assistance as an analogous ground by the Supreme Court of Canada would be a major inroad into the position, supported by the Ontario Court of Appeal, that economic disadvantage, on its own, is not a basis for *Charter* protection.

*Falkiner* puts the issue of intersectional discrimination front and centre. While the Court accepted the applicants' characterization of themselves as being discriminated against on the basis that they are single mothers on social assistance, it could not continue to deal with them as unified, multi-identitied wholes. The discrimination had to be related back to grounds and distinct comparator groups had to be determined with respect to each ground. The structure of the equality analysis set out by the Supreme Court of Canada in its decision in *Law* requires this kind of dissection and the focus on comparator groups perpetuates the similarly situated analysis that is a defining feature of formal equality. The substantive equality of the *Charter* does not require identical treatment but, to date, it has required the comparison of likes. This comparative approach remains a limiting feature of the analysis and one that impedes the courts' ability to address situations of intersectional discrimination in their complex wholeness. *Falkiner* may be an indication that we are on the way to fuller and more sensitive treatment of intersectional discrimination, although it begs the question of the possibility of moving beyond the additive approach of discrimination to an integrated approach.

### III. CONCLUSION

[O]utsiders, including feminists and people of color, have embraced legalism as a tool of necessity, making legal consciousness their own in order to attack injustice ... There are times to stand outside the courtroom door and say "this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom." There are times to stand inside the courtroom and say "this is a nation of laws, laws recognizing fundamental values of rights, equality and personhood." Sometimes, as Angela Davis did, there is a need to make both speeches in one day.<sup>119</sup>

This is the equivocal nature of the *Charter* and of equality,

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<sup>118</sup> *Falkiner*, *supra* note 111 at 514.

<sup>119</sup> Mari J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 *Women's L. Rep.* 7 at 8.



equivocation that I think is better seen as an opening than a shortcoming. Legal commentators tend to view themselves and others as either critics or supporters of the *Charter*, a demarcation that is seen to require the sacrifice of vision for action or vice versa. Embracing the contradiction of concurrent critique and invocation of the *Charter* may be one of the *Charter's* gifts to us as social activists who have to learn how to do both, simultaneously.

The critics and the pragmatists have both been right. As the cases amply demonstrate, the *Charter* is full of problems, of analysis and of results. At the same time, there have been some positive decisions, some good equality analysis, and some statements that take my breath away coming from the top court in our country. But this should be no surprise—this is the nature of equality; it does not provide answers, not even much in the way of direction; it is complex and contradictory and so, necessarily, are the equality arguments and the equality decisions.

In terms of women and equality, in my assessment, the most clear-cut gains have been with respect to reproduction and violence against women, although even in these areas the victories have been only partial and feel insecure. Although the risks of essentialism and overprotection are high, these may be areas in which the gender analysis is more easily grasped and perceived as less systemically threatening. Family issues are mired in the tension between formal equality and substantive equality; the vision of independent ungendered “equal” participants and the reality of gendered dependencies, assumptions, and values clash. Deeper equality analysis and more creative responses are needed.

The concerns raised about the *Charter's* inability, or the courts' unwillingness, to address socio-economic disparities and related issues are perhaps the most troubling. Given the current political climate and the ever-widening gap between rich and poor, as well as what appears to be increasing public tolerance for economic inequality, accompanied by increasing intolerance for “the poor,” it may be that socio-economic rights are the most pressing equality issues for everyone, and particularly for women. The *Charter* has provided a grounding for challenging these inequalities, but these challenges have so far been largely unsuccessful, despite their limited and specific foci and modest demands. The *Charter* critiques have perhaps been borne out most strongly in this area—in terms of an elitist judiciary refusing to recognize economic disadvantage as a primary ground of discrimination, the limited application of the *Charter* that precludes exposure of the “private” sector's role in poverty creation and perpetuation, and the veneer of formal equality coupled with liberal individualism that blame the most vulnerable and disadvantaged for the “choices” they are assumed to have made. The irony, however, is that many

of these left critiques of the *Charter* are the arguments most strongly invoked against the *Charter*'s application to socio-economic rights such that the left critiques become a self-fulfilling prophecy in relation to one of the most significant areas of potential *Charter* application.<sup>120</sup> Rather than concede the critiques, these critiques need to be incorporated into *Charter* challenges.

Intersectional discrimination is only one among a large number of issues and shortcomings in the *Charter* that cry out for fundamental shifts in our compartmentalized thinking, for creative advocacy, for vision and revisioning, and for the kind of soul-searching, uncertainty, and risk taking that Turpel advocated.<sup>121</sup> It remains to be seen whether those arguing within the constraints of the *Charter* can forge a way out of these restraints to point the way, or a way, or ways, toward equality and social justice. The restraints of the *Charter* are no more than the restraints of the society in which we currently live— individualism, privilege, entrenched notions of formal equality, and commitment to neutrality are prevailing social values. They need to be challenged on all fronts. The *Charter* presents one avenue for public education, mobilization, politicization, and creation of alliances and goals. The *Charter* presents the opportunity for equality and social justice advocates to critique and to dream at the same time and to pursue those dreams of concrete social change under a document that was not intended to accommodate fundamental social change. To me, these opportunities are at least as important as the question of whether those deciding *Charter* cases can be persuaded to embark on the social justice quest.

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<sup>120</sup> See McIntyre, *supra* note 5.

<sup>121</sup> *Supra* note 19.